

STATEMENT

OF

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BEFORE THE

COMMITTEE ON INDIAN AFFAIRS  
UNITED STATES SENATE

CONCERNING

FEDERAL TORT CLAIMS ACT CASES IN INDIAN COUNTRY

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Mr. Chairman and Members of the Committee: Good afternoon. I am Ethan Posner, Deputy Associate Attorney General at the United States Department of Justice. The Office of the Associate Attorney General oversees the Department's civil litigating components, including the Antitrust, Civil, and Civil Rights Divisions, as well as numerous other Department components, including the Office of Tribal Justice. My particular oversight responsibilities include matters arising from the Civil Division as well as a range of civil enforcement and tribal justice issues. On behalf of the Department, I am pleased to testify about claims under the Federal Tort Claims Act (FTCA) in Indian Country.

#### I. FUNDAMENTAL PRINCIPLES OF FEDERAL-TRIBAL RELATIONS

Let me begin by emphasizing the fundamental principles that guide the work of the Department of Justice with Indian tribes. Like the Congress, the Administration recognizes the importance of working with Indian tribes on a government-to-government basis. Federal government-to-government relations with tribal governments are rooted in the historical treaty relations and ongoing trust responsibility of the United States. President Clinton recently affirmed that:

Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection. In treaties, our Nation has guaranteed the right of Indian tribes to self-government. As domestic dependent nations, Indian tribes exercise inherent sovereign powers over their members and territory. Executive Order 13084, Consultation and Coordination with Indian Tribal Governments, 63 Fed. Reg. 27655 (1998).

Similarly, Congress has declared that the Federal trust responsibility "includes the protection of the sovereignty of each tribal government." 25 U.S.C. § 3601. Pursuant to these principles, the Department of Justice Policy on Indian Tribal Sovereignty and Government-to-Government Relations with Indian Tribes acknowledges that "[t]he Department shall be guided by principles of respect for Indian tribes and their sovereign authority and the United States trust responsibility in

the many ways in which the Department takes action on matters affecting Indian tribes.” In that same policy statement, the Department declares its “commit[ment] to strengthening and assisting Indian tribal governments in their development and to promoting Indian tribal self-governance.”

The Department has taken steps to promote government-to-government relations with Indian tribes, including the creation of the Office of Tribal Justice and the designation of Assistant United

States Attorneys to serve as tribal liaisons in districts that contain substantial areas of Indian country. The Department of Justice has also promoted government-to-government dialogue in tribal risk management. At the request of Chairman Campbell and Vice-Chairman Inouye, the Department of Justice, in conjunction with the Bureau of Indian Affairs and the Indian Health Service, sponsored a conference on tribal risk management in December 1998. The purpose of the conference was to share information on risk management, safety programs, loss prevention, and compensation mechanisms for injuries that arise out of tribal activity. Tribal risk managers, representatives from the Public Risk and Insurance Management Association, state and local risk managers, and representatives from federal agencies, including the Department, gave presentations at the conference.

## II. FEDERAL TORT CLAIMS ACT CASES IN INDIAN COUNTRY

Historically, the doctrine of sovereign immunity served as an absolute bar to recovery against the United States by those who experienced injury or loss as a result of tortious acts of employees of the United States. With the enactment in 1946 of the FTCA, the United States waived its sovereign immunity for “injury or loss of property, or personal injury or death arising from or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment[.]” 28 U.S.C. § 2679(b). The FTCA is

the exclusive remedy for any civil action or proceeding for money damages “arising out of or relating to the same subject matter” as the above; thus, any “other civil action or proceeding for money damages” arising out of a set of facts covered by the FTCA is “precluded without regard to when the act or omission occurred.” 28 U.S.C. § 2679(b)(1). The Department of Justice defends suits brought under the FTCA, which may be filed in federal court only after “the claimant shall have first presented the claim to the appropriate federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail.” 28 U.S.C. § 2675(a). If the Department determines that “the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose,” the civil action “shall be deemed an action against the United States . . . and the United States shall be substituted as the party defendant.” 28 U.S.C. § 2679(d)(1). Thus, for example, if a medical malpractice action is filed against a doctor in a Navy-operated hospital, and the Department determines that the doctor was “acting within the scope of his office or employment at the time of the incident,” then the Department will substitute the United States as a defendant and the case will proceed as an FTCA claim against the U.S. in district court. The Department confronts FTCA claims in Indian Country in a variety of circumstances. Perhaps the most common example is a medical malpractice action filed against a doctor or other medical professional arising out of treatment provided at a federally-operated hospital or other medical facility located within Indian Country, such as an Indian Health Services facility. Similarly, the FTCA would be implicated if a federal law enforcement officer (*e.g.*, FBI, DEA, BIA police), acting within the scope of his employment at the time of the incident, was named in a civil action involving the use of force arising from law enforcement activities in Indian Country. An accident

involving a federal government driver on a road in Indian Country also would likely implicate the FTCA. The Department also confronts FTCA claims filed against tribal members carrying out self-determination contracts under the Indian Self-Determination Act (“ISDA”). Enacted in 1975, ISDA furthers the goal of Indian self-determination by assuring maximum Indian participation in the management of federal programs for Indians. See 25 U.S.C. § 450 & 450a (2000). The Act provides that tribes may enter into self-determination contracts with the Secretary of the Interior and the Secretary of Health and Human Services to administer programs or services (such as education, medical services, construction) that otherwise would have been administered by the federal government. In 1990, the ISDA was amended to provide that “any civil action or proceeding” against “any tribe, tribal organization, Indian contractor or tribal employee” involving claims resulting from the performance of self-determination contract functions “shall be deemed to be an action against the United States” and “be afforded the full protection and coverage of the Federal Tort Claims Act.” 25 U.S.C. § 450f; see also 25 U.S.C. § 2804. Thus, if a claim resulting from the performance of functions under an ISDA self-determination contract is made against a tribal employee, and that employee was acting within the scope of his employment at the time of the incident, then the Department of Justice will defend the action and move to substitute the United States as a party for the tribal employee. These provisions are an important part of the ISDA and the Federal policies on which the Act is based. At the Committee’s request, we have focused our testimony on the four legal issues described in the recent GAO Report on the FTCA – removal to federal court; “law of the place” (state vs. tribal law); the extent to which tribal council members may be covered by the FTCA; and the extent to which tribal law enforcement officers should be considered federal law enforcement officers for purposes of the FTCA.

### III.REMOVAL OF FTCA CLAIMS FROM TRIBAL TO FEDERAL COURTS

Under the FTCA, the federal “district courts” have “exclusive jurisdiction” over any action covered by the FTCA. 28 U.S.C. § 1346(b). Thus, if a claim under the FTCA (or tort claim covered by the FTCA) is brought against the United States or a FTCA-covered person in a state court or even another federal court such as the Court of Federal Claims, it is subject to dismissal or removal. See, e.g., Strick Corp. v. United States, 625 F.2d 1001, 1010 (Ct. Cl. 1980) (Court of Claims has no jurisdiction to hear FTCA claims); see also Louis v. United States, 967 F. Supp. 456, 458-59 (D.N.M. 1997) (tribal court is not a “district court” under 28 U.S.C. § 1346(b)).

The FTCA explicitly provides that FTCA claims filed in state court may be removed to “the district court of the United States for the district and division embracing the place in which the action or proceeding is pending.” 28 U.S.C. § 2679(d)(2).

There is, however, no parallel procedure that allows for actions covered by the FTCA that are filed in tribal courts to be removed to federal court. Over the past few years, Federal employees and tribal contract employees have been named in several FTCA suits filed in tribal court.

Currently, the Department’s options in dealing with these cases are limited – we can write the tribal court to request a voluntary dismissal of the case, or at least that part of the case involving federal employees or defendants; or we can ask the appropriate federal district court to enjoin or otherwise set aside the tribal court’s actions. We cannot remove the tribal action to federal court, however. The lack of an available removal mechanism to transfer FTCA cases from tribal to federal court should be remedied. Congress has made the determination that the federal courts (not state or tribal courts) should be the exclusive arbiter of questions under the FTCA and it is an anomaly that the government can remove FTCA cases from state courts but not tribal courts.

Fixing this gap in the removal statute is also consistent with the long tradition that the liabilities and obligations of the United States and its employees are determined by federal courts, not state courts or tribal courts. As courts have recognized, state courts and tribal courts likely would not be as receptive to the sovereign immunity of the federal government as federal courts. The lack of a removal provision to federal court also can operate to the detriment of some plaintiffs who file a complaint (perhaps mistakenly) in tribal court. An errant filing of an FTCA claim in tribal court may cause the limitations to lapse on an otherwise timely claim before the claimant files in federal court. Likewise, litigants may expend scarce resources pursuing an action in tribal court that could and should be easily removable to federal court. For these reasons, the Department of Justice believes that a provision of the federal removal statute, 28 U.S.C. § 1442, should be amended to permit removal of FTCA actions from tribal court to federal district court. Other amendments to the removal statute regarding the removal of non-FTCA actions filed against tribal officers in state courts and non-FTCA actions filed against federal officers in tribal courts also may be appropriate. If the Committee is interested in these issues, we are prepared to work with appropriate staff to develop appropriate language to address these issues.

#### IV. THE “LAW OF THE PLACE”

Under the FTCA, the United States may be liable for the negligent acts of federal employees acting within the scope of their employment “under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.” 28 U.S.C. § 1346(b); see also 28 U.S.C. § 2674. An issue has arisen in a few recent FTCA cases as to whether “the law of the place” is state law or tribal law when the

alleged tortious act took place on tribal land. The Department believes that state law, not tribal law, provides "the law of the place"

First, when enacting the FTCA, Congress intended for the "law of the place" to mean the law of the state where the alleged negligence occurred, whether that act occurred on tribal land or not. As the accompanying House Report to the bill stated, "each case [under the FTCA] is determined in accordance with the law of the State where the death occurred." H.R. Rep. No. 748 (1947), reprinted in 1947 U.S.C.C.A.N. 1548. Recognizing this, the Supreme Court has observed that state law is "the source of substantive liability under the FTCA." FDIC v. Meyer, 510 U.S. 471, 478 (1994). Over the years, this has meant that state law applies even when the alleged negligent act or omission occurs on a federal enclave or federal land, a location that would require the application of federal law if a private defendant was involved. See, e.g., Shankle v. United States, 796 F.2d 742 (5<sup>th</sup> Cir. 1986) (state law applies even though acts occurred on federal military installation); Lutz v. United States, 685 F.2d 1178, 1184 (9<sup>th</sup> Cir. 1982) (same; acts occurred on air force base). Second, if tribal law provided the law of the place, the United States and its employees would be subjected to the laws of more than 550 "places," the approximate number of federally-recognized tribes. This expands the waiver of sovereign immunity far beyond what Congress intended in enacting the FTCA. As one court observed, if tribal law provided the law of the place

[I]t would subject the United States to varying and often unpredictable degrees of liability, depending on the reservation that was the site of the occurrence. In the District of New Mexico alone, for example, there are great differences between the many tribes and their approaches to legal issues. In some instances, the difficulty in proving the existence and substance of any tribal law on the subject of the tort would be considerable. The Court does not believe Congress intended such a result when adopting the FTCA ....

Louis v. United States, 54 F. Supp.2d 1207, 1210 n.5 (D.N.M. 1997) (citation omitted).

Similarly, the administrative claims process mandated by the FTCA would be materially undermined and complicated because of the difficulties in ascertaining and applying tribal law. Third, if tribal law provided the “law of the place,” many cases under the FTCA would require application of both tribal law and state law. For example, if the FTCA complaint asserted claims against tribal and non-tribal personnel (as often happens), then a federal court could be required to apply state law at least to the acts of the non-tribal personnel, resulting in the application of state and tribal law to the same underlying facts. A case in which both tribal and state law applies is inconsistent with the plain text of the FTCA, which requires application of a single “law of the place.” Courts already have concluded that the law of one state, not two, must apply, even if multiple states have jurisdiction over the site of the alleged negligence. Brock v. United States, 601 F.2d 976, 979 (9<sup>th</sup> Cir. 1979). It would be incongruous if the law of two states cannot apply but the law of one state plus tribal law could apply.

Given these issues, it is not surprising that for more than fifty years the phrase “the law of the place” in 28 U.S.C. § 1346(b) has been understood to refer to state law. See FDIC v. Meyer, 510 U.S. 471, 478 (1994) (“[W]e have consistently held that § 1346(b)’s reference to the “law of the place” means law of the State). Indeed, prior to 1999, every single court to have entertained an FTCA suit arising out of incidents occurring on tribal land applied the law of the state in which that land was situated. See e.g. Champagne v. United States, 40 F.3d 946 (8<sup>th</sup> Cir. 1994) (FTCA case alleging medical malpractice by the Indian Health Service leading to suicide, North Dakota law applied); Sauceda v. United States, 974 F.2d 1343 (9<sup>th</sup> Cir. 1992) (failure by BIA police to arrest drunk driver); Red Lake Band of Chippewa Indians v. United States, 936 F.2d 1320, 1325

(D.C. Cir. 1991). Although one court recently concluded to the contrary, Cheromiah v. United States, 55 F. Supp. 2d 1295 (D.N.M. 1999), we believe that case was wrongly decided, as a more recent court concluded. Bryant v. United States, Order, Civ. No. 98-1495 (D. Ariz. Jan. 11, 2000). To apply tribal law to FTCA actions would mark a dramatic departure from the great weight of authority spanning more than half a century of FTCA jurisprudence.

#### V. APPLICATION OF THE FTCA TO TRIBAL PERSONNEL

When the ISDA was amended in 1990, Congress extended “the full protection and coverage” of the FTCA to “any tribe, tribal organization, Indian contractor or tribal employee” who is sued for actions performed “while acting within the scope of employment in carrying out” a contract under the ISDA. 25 U.S.C. § 450f and Notes. Under this provision, if the suit against the Indian contractor or tribal employee results from activities performed outside the scope of employment, then the individual would not be covered under the FTCA and the Justice Department would not seek to substitute the U.S. as a defendant. Likewise, if the individual was performing activities within the scope of employment but not in furtherance of the “carrying out” of an ISDA contract, then the FTCA also would not apply. The question in civil actions arising out of the performance of ISDA contracts, therefore, is whether the Indian contractor or tribal employee is being sued for “carrying out” the performance of the self-determination contract.

The Department of Justice makes that determination on a case-by-case basis. Pursuant to applicable statutes and regulations, we review the facts in each case and make a decision based on the provisions of the relevant statutes, the actions of the tribal personnel, and the particular terms of each contract. We understand that some tribes have expressed concerns based on a decision we made regarding tribal council members in two related cases filed in Nebraska. In that

litigation, the plaintiff sued the tribal council and various tribal employees, alleging injuries arising out of the Omaha Tribe's management of a detention facility pursuant to a self-determination contract. The information provided indicated that the council members' only connection to the ISDA contract was that they initially approved the master self-determination contract, which included the law enforcement contract at issue in the case. Based on that information, the Department concluded that the tribal council members were not involved in "carrying out" the contract and, therefore, were not covered under the FTCA in that particular litigation.

The Department of Justice has no policy, formal or informal, of denying FTCA coverage to tribal council members or senior administrative personnel. On the contrary, we have extended the protections of the FTCA to tribal council members in at least one other case, again based on the particular facts and circumstances involved. We will continue to work closely with tribal personnel to ensure that the protections of the FTCA apply in all appropriate circumstances.

#### VI. FTCA COVERAGE FOR TRIBAL LAW ENFORCEMENT OFFICERS

As the recent GAO report on the FTCA explains, the FTCA bars claims for many intentional torts (such as assault, battery, and false arrest) except for those that may be committed by "investigative or law enforcement officers of the United States." 28 U.S.C. § 2680(h). The FTCA defines "investigative or law enforcement officers of the United States" as "any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." 28 U.S.C. § 2680(h). If, for example, the case at issue involved the use of force on an Indian reservation by an FBI agent, or a DEA agent, or a BIA police officer, then the officer in question would almost certainly be an "investigative or law enforcement officer of the United States." And if that officer was otherwise covered by the

FTCA (*i.e.*, he was acting within the scope of his employment), then the United States would be substituted as a defendant as to the common law tort claims and the action for excessive force could proceed under the FTCA.

There is also the question of whether and to what extent tribal police or other law enforcement personnel are acting as “investigative or law enforcement officer[s] of the United States.” If a tribal police officer had a BIA commission, or was performing services pursuant to a law enforcement agreement between the tribe and the Department of Interior authorizing the officer to enforce a “law of the United States,” see 25 U.S.C. § 2804(a), then the officer almost certainly would be considered an “investigative or law enforcement officer of the United States.” Conversely, there could be other situations in which a tribal law enforcement officer should not be considered an “investigative or law enforcement officer of the United States.” It would depend on the particular facts and circumstances involved.

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Mr. Chairman, we appreciate the opportunity to discuss these important legal issues and I would be happy to answer any questions you or the other Members may have.